IN RE THE ARBITRATION BETWEEN

AMALGAMATED TRANSIT UNION, LOCAL 1005

AND

METRO TRANSIT

DECISION AND AWARD OF ARBITRATOR
BMS CASE NO. 07-PA-0543

CAROL BERG O'TOOLE
ARBITRATOR
MARCH 26, 2007

REPRESENTATIVES:

FOR THE UNION:
Roger Jensen, Attorney
FOR THE EMPLOYER:
Andrew Parker, Legal Counsel

APPEARANCES:

FOR THE UNION:
Latisha Eaddy, Grievant
James P. Perron
Frank Stumpf
Romy Jurcoi

FOR THE EMPLOYER:
Sam L. Jacobs, Division Director

PRELIMINARY STATEMENT

The hearing in the above matter was held at 10:00 AM on March 5, 2007, at the offices of the Employer's legal counsel, Parker Rosen, LLC, at 133 First Avenue South, Minneapolis, Minnesota 55401. The parties presented oral testimony and documentary evidence and the hearing was closed by the arbitrator on the same day.

ISSUE PRESENTED

Whether there is just cause to discharge the Grievant? If not, what is the remedy?

CONTRACTUAL JURISDICTION
The parties are signatories to a collective bargaining agreement covering the period from August 1, 2005 to July 31, 2008. Article 13 provides for submission of disputes to arbitration. At the beginning of the hearing the parties stipulated that they waived the right to a three party panel and selected the undersigned to hear and decide the matter. The parties also stipulated that there were no arbitrability issues and that the matter was properly before the arbitrator.

EMPLOYER'S POSITION
The Employer's position is that there is just cause to terminate the Grievant. The Employer contends:

1. Latisha Eaddy, the Grievant, was a operator for Metro Transit who started working for the Employer, Metro Transit, in January, 2004. Grievant's job was driving a bus.

2. Sam L. Jacobs, a thirty-seven year employee with Metro Transit and the Division Director, testified that Grievant and other operators are typically trained for a period of six weeks, with a large component of that training in public safety.

3. During the training period and after, operators are introduced to various rules and procedures. The Grievant received a copy on January 6, 2004, of the Bus Operator's Rule Book & Guide. She signed an acknowledgment on January 6, 2004, that she was responsible for knowing the contents and realized that she was governed by the rule book and guide and periodic updates.

4. The Grievant also received a copy of the Operating Policy (Procedure 4-7d) and Bus Operator Absenteeism Policy on August 1, 2005

5. Jacobs testified that, after extensive meeting and conferring with the Union, the Amalgamated Transit Union, Local 1005, the Bus Operator's Rule Book & Guide were updated, adopted by the Employer and made effective on August 13, 2005.

6. Procedure 4-7d provides for two classes of violations, Class A and Class B. Class A violations result in a written warning, a final written warning and termination. Class B violations result in a verbal warning, a written warning, a final written warning and termination. Combinations of Class A and Class B violations are treated in the following ways: one Class A and two Class B violations result in a final written warning; two Class A and one Class B violations result in a final written warning; two Class A and two Class B violations result in termination; one Class A and three Class B violations result in termination.

7. The procedures also provide that, for safety violations within a rolling three-year period, the first responsible accident results in a verbal warning, the second responsible accident results in a written warning, the third responsible accident results in a final written warning, and the fourth responsible accident results in termination. Responsible

accidents are those where the operator is considered at fault. Avoidable accidents are those that could be avoided by the operator.

8. The Grievant's first disciplinary incident was in December 15, 2004. The avoidable accident involved the bus hitting a fixed object, a yellow post, while pulling into the vault area of the garage. The incident was considered avoidable. Grievant was held responsible for the accident, her first, and it was recommended that she attend Safety Keys. The Grievant did so on January 4, 2005.

9. The Grievant was involved in a second disciplinary incident, a Class A violation. On December 10, 2005, while operating the bus, she failed to carry her operator's license and employee ID, thereby preventing her from traveling her route to the Mall of America.

10. Section 410 of the procedure indicates that, "A valid Class A or B CDL operator's license is a condition of employment and must be carried on your person at all times while on duty along with your DOT certification card." By Operator Bulletin #84, bus operators were also required to carry their IDs with them and show the guard for security purposes at the Mall of America.

11. Grievant's December 10, 2005, incident was considered a Class A violation. Jacobs testified that class A violations are particularly troublesome if anyone is on the bus and has to be moved to another bus. The Record of Warning stated that the violation was issued "on 12/10/2005 for failure to have her driver's license in her possession while operating a Metro Transit bus. This omission resulted in service being lost ..."

12. A written warning was issued on January 5, 2006, where Grievant was warned that receiving another Class A or two Class B violations "within the life of this warning will result in a Final Warning for Adherence being issued." Grievant acknowledged receipt of the warning and understanding that a failure to change behavior would result in more severe discipline, up to and including temination.

13. The January 5, 2006, written warning also included a referral to DOR & Associates, the Employer's employee assistance plan. Jacobs testified that the DOR & Associates referral was made for the Grievant in case she needed help.

14. On December 29, 2005, Grievant was involved in a third disciplinary matter, a Class B violation, operating late, when she left the M.J. Ruter Garage at 12:29:53 PM instead of 12:24:00 PM. Jacobs testified that Grievant's tardiness was avoidable, because she didn't need to talk that day to the manager at the garage about a Family and Medical Leave matter that was a week away.

15. On January 4, 2006, the Grievant received a Record of Warning for excessive absenteeism for seven chargeable occurrences of absenteeism within a rolling calendar year. The warning stated that ten occurrences within a rolling calendar year would result in a Final Warning and thirteen would result in termination. James P. Perron, the manager, wrote that "Without a drastic change in the manner in which you approach

your job and duties, it appears your employment with Metro Transit is in jeopardy." Again, the Grievant was referred to employee assistance.

16. On March 30, 2006, Grievant was disciplined a fourth time when she "ran hot", leaving a time point at 7th and Olson Highway ahead of schedule. This was a Class B violation. Grievant acknowledged on the written form that she "is responsible for her actions and has no excuse for departing early. Op is requesting that this please be reduced to Observation Only. Op apologizes and states she will be more vigilant."

17. On March 30, 2006, Grievant was issued a Final Record of Warning, signed and dated by Perron on May 8, 2006, stating that the Grievant had received one Class A and two Class B violations within a twelve month period. The Grievant was told in writing that "...you are a relatively new employee (hired 1/05/04), that has traveled quickly to a Final Record of Warning status. It is important you are aware of your standing as it relates to the Metropolitan Council's Operating Policy, and focus on immediately improving your performance relating to its content."

18. On May 23, 2006, the Grievant received a final Final Record of Warning for excessive absenteeism. The warning indicated that, "The absences, particularly the Late occurrences, are truly a hardship for the agency as we struggle to put the scheduled service on the street."

19. On September 28, 2006, Grievant had a second accident, constituting her third debit. She described it saying she was "attempting to pass cars to get into Bus stop at 60th and Portland...midblock swiped a utility or telephone pole (wooden) with mirror..." This incident resulted in a Record of Warning dated October 6, 2006 stating, "[Y]ou are receiving this Record of Warning as a result of your second (2) driver responsible accident...[which] is equal to one debit. Your work history records demonstrate this is your third debit under the Metro Transit Operating Policy." The Grievant was again referred to DOR & Associates for employee assistance for this performance issue.

20. Jacobs testified that the procedure doesn't talk about the degree of severity of accidents, but that the September 28th incident resulted in 4.8 hours mechanic's time to repair the damage and that he did not view the accident as insignificant. He also testified that there were eighteen people on the bus who had to wait until a replacement bus came.

21. Jacobs testified that Grievant did not challenge the chargeability of any of the discipline.

22. On October 9, 2006, Grievant was given a Notice of Discharge dated October 10, 2006. The grounds for the discharge were stated as "3 debits under Metro Transit's Operating Policy" and "Overall Record".

23. Jacobs testified he reviews a work record any time a termination is executed to see if there are any problems and that he did so with the Grievant. Grievant was struggling

with safety rules, procedures and getting to work on time. Jacobs testified that he considered both aggravating and mitigating factors. He stated that he considered Grievant's lack of longevity and that she wasn't "dependable". Under cross examination Grievant admitted that the matters leading to the discipline were not someone else's fault.

24. Jacobs testified that in determining whether Grievant should be terminated he also considered the need for safety and customer service. Jacobs said that, under the circumstances, the termination was consistent with what other employees would receive and constituted equal treatment.

UNION'S POSITION:

1. Grievant is a 34 year old mother of one child who is seven years of age. Grievant grew up in Highland Park and trained at Globe College, Metropolitan Technical College and the University of Minnesota. She resides with her boyfriend and, at the time of the discipline in question, was an informal foster parent to his two children, aged 8 and 17.

2. Grievant testified that she has prior driving experience at Rider Student Bus Company, at the Minneapolis Public Schools, and at First Student and Laidlaw where she drove a "short bus" for special education students in Osseo. In addition, she has work experience as a personal care attendant.

3. Grievant's testified that her full time bus operator at the Metro Transit was especially desirable because she received benefits, including health and hospitalization.

4. The Grievant claims on the grievance form a violation of Article 5, Section 1 and Metro Council's operating policy. Article 5, Section 1 provides, "Metro Transit reserves to itself, and this Agreement shall not be construed as in any way interfering with or limiting, its right to discipline its employees, but Metro Transit agrees that such discipline shall be just and merited." Grievant seeks reinstatement.

5. There is no challenge to the facts leading to the disciplinary actions. The question is whether the Employer exercised discretion to depart from the policy to take into account mitigating and aggravating factors delineated in Procedure 4-7d, II Procedure, Manager Discretion.

6. The Employer failed to consider sufficiently mitigating factors. In Grievant's second accident on September 28, 2006, the glass on the mirror of the bus that was bent back and didn't break. Nor was the vehicle taken out of service. The Employer did not consider this, nor the fact that no one was injured. The Grievant testified that the replacement bus that picked up the passengers was "almost right behind me" and estimated the wait time was only six minutes.

7. There were mitigating factors that the Employer failed to consider sufficiently in the December 10, 2005, incident involving Grievant's ID and drivers' license. The Grievant

typically kept the ID and drivers license in her purse; but, one of her foster children, the eight-year-old, took her wallet from her purse without Grievant's knowledge. As soon as she discovered the items missing, Grievant called the Employer.

8. Grievant testified that in the December 29, 2005, incident where she had a late start there were mitigating factors that the Employer failed to sufficiently consider. She had called her supervisor earlier and asked him for an FMLA form for surgery she was to have on her right knee. He didn't have it ready so that held her up and she had to get something to eat and heat it up also. She testified she was only six minutes late.

9. In the March 3, 2006, incident where Grievant ran "hot", she testified that she left right on time and then was distracted by another driver who boarded at Olson. When the light turned green she inadvertently took off.

10. Grievant explained that she believes her attendance problems related to her foster children and the attendant work involved in getting them into schools. She testified that her sleep apnea and injured knee adversely affected her work attendance and tardiness. She testified that she would avoid future attendance and tardiness problems because she has had her knee fixed, her sleep apnea is under control, and she only has one child at home. She believes that she would avoid future accidents by "do[ing] her best". She testified that she would avoid problems with her ID and her drivers' license by a "check before leaving the house". Grievant also testified that she had taken advantage of employee assistance, including seeing her own therapist (paid for through the Employer's health insurance) after going to the regular employee assistance.

11. There should be a departure from the procedure which provides for termination and Grievant should be given another chance. The Union describes Grievant as a very nice lady who wants her job back because it is important to her financially. Grievant is very unlikely to repeat the violations and is entitled to reinstatement, with, perhaps a Last Chance Agreement.

DISCUSSION

At issue in this arbitration is the cause standard for discharge. Elkouri and Elkouri's *How Arbitration Works* (Ruben 2003) is illuminating in determining whether the Employer has met the "cause" standard for discipline and the requisite burden and quantum of proof.

In this case, there is no question whether the incidents leading to the discipline happened. The Union did not contest this. Guilt of wrongdoing has been established.

The only question is whether the punishment assessed by the Employer should be upheld or modified. To determine that, a number of factors are typically considered: past record, length of service, knowledge of rules, due process or warning, equal treatment of other employees.

The offenses in this case may be mitigated by a good past record or may be aggravated by a poor one. The Grievant has a record that is, unfortunately, quite consistently problematic. It is a record besmirched by attendance problems, accidents, and rule violations. This factor does not mitigate in favor of a lesser discipline.

It is also appropriate to consider length of service with the Employer. Grievant has not worked long for the Employer; in fact, she started less than two years before she was terminated. This factor, likewise, does not mitigate in favor of a lesser penalty.

Another factor is whether the Grievant is knowledgeable of rules. Exhibit after exhibit proves that the Grievant knew the rules.

Grievant's termination might also be questioned if there was an the absence of fair warning or due process. Again, exhibit after exhibit with Grievant's signature clearly indicating receipt, shows no lack of fair warning. Grievant attended Safety Keys Driver Training Program after the first accident. She utilized employee assistance. She continued to have problems. She had ample opportunity to change her ways. She didn't.

Finally, Grievant's termination might be considered too severe if it was shown that others with similar records of rule violations were not terminated. The testimony was to the contrary. In fact, Jacobs testified that to do other than terminate Grievant would constitute unequal treatment.

If the Grievant had been with the Employer longer or the violations had not been so numerous, the Arbitrator would have considered favorably the plea to modify the discipline. There is no doubt that the Grievant, more so than many employees, had many hurdles in her private life which made performing her job difficult. Her (and her counsel's) candor and her readiness to owe up to her failures tell this arbitrator that she will learn from this experience. Mistakes train best because they are unforgettable. This arbitrator has no doubt that the Grievant will do well with a different employer driving a different bus. She has started on that road to success by, in large part, a refusal to blame others. The termination stands. There is no violation of the collective bargaining contact, rules or procedures.

AWARD

The grievance is denied.

Carol Berg O'Toole March 26, 2007